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Via Electronic Submission

Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: Comments of Powerex Corp. on the Second Set of Proposed 15-Day Modifications to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions and the Second Set of Proposed 15-Day Modifications to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation

Dear Chairman Nichols and Members of the Board:

On behalf of Powerex Corp. ("Powerex"), I submit the following comments on the California Air Resources Board's ("ARB's") second set of proposed 15-Day Modifications to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions rule (the "Mandatory Reporting Rule" or "MRR") and ARB's second set of proposed 15-Day Modifications to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation (the "Cap-and-Trade Rule"), both of which were released by ARB on September 12, 2011.

Powerex is a corporation organized under the Business Corporations Act of British Columbia, with its principal place of business in Vancouver, British Columbia, Canada. Powerex is the wholly-owned energy marketing subsidiary of the British Columbia Hydro and Power Authority ("BC Hydro"), a provincial Crown Corporation owned by the Government of British Columbia. Powerex sells wholesale power in the United States, pursuant to market-based rate authority granted by the Federal Energy Regulatory Commission ("FERC") in October 1997, renewed most recently effective January 1, 2009.

Powerex sells power from a portfolio of resources in the United States and Canada, including Canadian Entitlement resources made available under the Columbia River Treaty, BC Hydro system capability, and various other power resources acquired from other sellers within the United States and Canada. Powerex also buys and sells power in Canadian provinces other

than British Columbia and in Mexico. Powerex has been delivering power to California since shortly after receiving its market-based rate authority in 1997.

Powerex applauds ARB's efforts to create and implement a comprehensive greenhouse gas ("GHG") emission reporting program and a cap-and-trade program. Both serve to fulfill the mandate of the California Global Warming Solutions Act ("AB 32") to reduce GHG emissions in California and to combat global climate change. With the latest sets of changes to the MRR and the Cap-and-Trade Rule, ARB has made significant progress toward achieving the goals of AB 32.

Powerex greatly appreciates the efforts made by ARB to respond to its August 11, 2011 comments on ARB's first set of proposed 15-day Modifications to the MRR and Cap-and-Trade Rule. Complicated questions remain, however, with respect to the scope, applicability, and implementation of both programs. Moreover, as discussed more fully below, there are significant legal issues that have the potential to imperil the programs. With these in mind, Powerex offers the comments set forth below with the goal of improving and refining both programs.

Because the two rules are so deeply entwined (*e.g.*, the data submitted via the MRR often will determine the compliance obligations that apply to covered entities under the Cap-and-Trade Rule and also will be the basis for covered entities to demonstrate compliance with those obligations), Powerex submits these comments on both sets of proposed modifications to the two rules. Comments on specific provisions of the MRR are set forth in sections I, II, and IV.B, and comments on specific provisions of the Cap-and-Trade Rule are set forth in sections I, II, III, and IV.A. Powerex offers these comments as an electric power entity under the Mandatory Reporting Rule and as a covered entity and first deliverer of electricity under the Cap-and-Trade Rule. All the comments are based upon Powerex's expertise and experience buying and selling power throughout North America, including California.

I. ARB Should Amend the Rules to Clarify that Entities other than BPA may be Classified as "Asset-Controlling Suppliers."

In Powerex's August 11, 2011 comments, we expressed concern that removing Pacificorp and Sierra Pacific Power Company from the definition of "asset-controlling supplier" in both the MRR and the Cap-and-Trade Rule could lead to an inappropriate interpretation that no entity other than BPA could become an asset-controlling supplier. Limiting the eligibility for categorization as an asset-controlling supplier to BPA, would be to the detriment of comparable hydropower resources in the Pacific Northwest such as the hydropower generation facilities owned and controlled by Powerex's parent BC Hydro. We do not believe that this is ARB's intent, but the second set of proposed 15-Day Modifications to the MRR fails to clarify that the asset-controlling supplier category is <u>not</u> restricted to BPA. Indeed, some of the changes since

the first set of proposed 15-Day Modifications in July make it more likely that the rule could be interpreted as limiting the definition to BPA.

BPA is of course government-owned. It is an agency within the U.S. Department of Energy, and was created by Congress in 1937. 16 U.S.C. Sections 832-832m. BPA was "tasked with marketing the power generated by federally-owned dams on the Columbia River." *Portland General Electric Company v. Bonneville Power administration*, 501 F.3d 1009 (9th Cir. 2007). The special treatment of BPA in the rules highlights the fact that ARB has "National Treatment" obligations to Powerex under Chapters Six and Eleven of the North American Free Trade Agreement ("NAFTA"), Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 289, chapts. 6, 7 (1993).[1] Powerex and its parent BC Hydro are both owned by the Province of British Columbia, and Powerex is tasked by British Columbia with marketing the power generated by provincially-owned dams on the Columbia and Peace Rivers. The Ninth Circuit Court of Appeals has ruled that BC Hydro is a foreign sovereign under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, and that Powerex is an "organ of a foreign state" under the statute. *Cal. Dep't of Water Resources v. Powerex Corp.*, 533 F. 3d 1087 (9th Cir. 2008**)**. In pleadings submitted to the Court in that case, the US Department of State, as well as the Governments of Canada and British Columbia, supported the interpretation of the law that underlies this finding. Thus, in terms of government ownership and the legal status that it confers, Powerex is indistinguishable from BPA.[2]

Under NAFTA's National Treatment standard, Powerex is entitled to parity treatment with BPA. This requirement extends to actions by states, including the compliance obligations placed by the ARB rules on first deliverers of imported electricity. Such actions fall within the definition of an "energy regulatory measure" under Chapter Six of NAFTA, which is defined in Article 609 of NAFTA as,

> . . . any measure by federal or sub-federal entities that directly affects the transportation, transmission or distribution, purchase or sale, of an energy or basic petrochemical good.

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[1] NAFTA was brought into U.S. law by the NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, codified in 19 U.S.C. 3301-3473 (1993).

[2] This equivalency has a direct analogue in the Mandatory Reporting Rule. The bulk of BC Hydro's generation is hydropower, comprised of large hydro storage reservoirs, small hydro generation, and run-of-the-river projects. BC Hydro's general system supply also includes clean and renewable long term agreements, Canadian Entitlement energy returned to British Columbia under the Columbia River Treaty, energy for system balancing obtained in California and other markets in the Western Electricity Coordination Council, and a small percentage of thermal resources used primarily for system support and emergencies. Powerex acts as BC Hydro's exclusive marketer when it has export capability. Such power is identified on NERC E-tags as being sourced from the BC Hydro system. Thus, the hydropower generation facilities owned and operated by BC Hydro are directly analogous to the "assets" that BPA controls within the meaning of MRR Section 95102.

Electricity is considered an "energy good" under Chapter Six of NAFTA, and energy regulatory measures are thus subject to NAFTA's National Treatment standard. This standard requires each NAFTA Party — in this case, ARB as a sub-federal governmental entity — to accord investors of another NAFTA Party and their investments,

> . . . treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

Powerex qualifies as a NAFTA investor for National Treatment purposes. If an energy regulatory measure by ARB under Chapter Six of NAFTA violates that standard, Powerex would be entitled to file a claim under Chapter Eleven of NAFTA. Such an action necessarily would implicate the federal government of the United States.

To mitigate the potential for any NAFTA claim with respect to the compliance obligation placed by the ARB rules on first deliverers of imported electricity, Powerex strongly encourages ARB to modify the language in the rules to clarify that the category of Asset-Controlling Suppliers is not limited to BPA. To avoid running afoul of NAFTA, Powerex urges ARB to modify the MRR as follows.

1. *At Section 95111(b)(3):*

   Calculating GHG Emissions of Imported Electricity Supplied by Specified Asset-Controlling Suppliers. ARB will calculate and publish on the ARB Mandatory Reporting website the system emission factor for ~~Bonneville Power Administration,~~ any asset-controlling suppliers recognized by the ARB. The reporting entity must calculate emissions for electricity supplied as using the following equation:

   $$CO_2e = MWh \times TL \times EF_{ACS}$$

   Where:

   CO2e = Annual CO2 equivalent mass emissions from the specified electricity deliveries from ~~Bonneville Power Administration~~ asset-controlling suppliers (MT of CO2e).

2. *At Section 95111(a)(5):*

   Imported Electricity Supplied by Asset-Controlling Suppliers. The reporting entity must separately report imported electricity

> supplied by ~~Bonneville Power Administration,~~ any asset-controlling supplier recognized by ARB. ~~Bonneville Power Administration~~ The PSE associated with the asset-controlling supplier must be identified on the NERC E-tags as the PSE at the first point of receipt. . . .

The above proposed change addresses the fact that the first PSE on the NERC E-Tag may be the Asset-Controlling Supplier or, due to the relationship between the parties, may be the owner of the electricity generating facilities for which the Asset-Controlling Supplier acts as exclusive marketer.

3. *At Section 95111(f):*

> GHG Emissions Data Report: Additional Requirements for Asset-Controlling Suppliers. ~~Bonneville Power Administration~~Any asset-controlling supplier recognized by the ARB may request ARB calculate its supplier-specific emission factor based on a previously verified GHG report that meets the requirements for asset-controlling suppliers, instead of a default system emission factor equal to 20 percent of the default emission factor for unspecified sources. . . .

In addition to the proposed modifications set forth above, Powerex reiterates the request made in its August 11, 2011 comment letter that ARB either revise the MRR and/or the Cap-and-Trade Rule or issue guidance to explain how an entity should apply to ARB for recognition as an asset-controlling supplier and what criteria and procedures ARB will use to make a determination for each applicant.

II. The Renewable Portfolio Standard Adjustment Includes a Potentially Fatal Flaw that can be Easily Fixed.

Powerex understands that the Renewable Portfolio Standard ("RPS") Adjustment provisions are critical to ensure that the zero-emission components of renewable energy are properly counted under the RPS, the MRR and the Cap-and-Trade Rule. Powerex therefore supports the inclusion of some form of RPS Adjustment in the Cap-and-Trade Rule. However, as currently drafted, the RPS Adjustment is at risk of legal challenge on two grounds.

First, the RPS Adjustment may impermissibly intrude upon the jurisdiction of FERC. The Federal Power Act ("FPA"), 16 U.S.C. §§ 791-828c, gives FERC exclusive jurisdiction over sales of electricity at the wholesale level in U.S. interstate commerce, and over the interstate transmission of electricity. 16 U.S.C. 824(b); *Duke Energy Trading & Marketing, LLC v. Davis*, 267 F.3d 1042 (9th Cir. 2001); *State of Cal. v. Dynegy, Inc.*, 375 F. 3d 831 (9th Cir. 2004). This jurisdiction preempts other federal or state agencies from taking any action that would encroach

on matters entrusted by Congress to FERC alone, including matters such as the justness and reasonableness of rates and charges of wholesale power sellers, the use of interstate transmission capacity, and, most important here, the operation of interstate power markets, including review of any action or conduct that could result in undue discrimination against, or undue preference to, a market participant.[3]

In its currently-proposed form, the RPS Adjustment could constitute impermissible discriminatory treatment of imported power. Specifically, the proposed RPS Adjustment methodology at Section 95852(b)(4) of the Cap-and-Trade Rule that requires the associated RECs to be used to comply with California RPS requirements improperly restricts the low-carbon intermittent generation that can be delivered and credited to those entities under contract to deliver RPS power to California load serving entities ("LSEs"). This has the practical effect of granting an undue preference to the California LSEs, and unduly discriminating against first deliverers of imported power into the state that do not have RPS contracts with a California LSE. In addition, by limiting the low-carbon intermittent generation to "eligible renewable energy resources" as defined in Section 399.12 of the Public Utilities Code, it also appears that the RPS Adjustment would interfere with the flow of certain power deliveries in interstate commerce in favor of California's local interests. Shaping of intermittent generation is inherently incident to sales of electricity at the wholesale level in interstate commerce. As a result, the RPS Adjustment, as currently drafted, falls plainly within FERC's FPA jurisdiction, both because of its impact on the movement of wholesale electricity across California's border and its undue discrimination in favor of California LSEs.

Second, the restriction of the RPS Adjustment to California LSEs makes it vulnerable to a Commerce Clause challenge. Specifically, by limiting the RPS Adjustment to California LSEs, the Cap-and-Trade Rule discriminates against interstate commerce in favor of local interests in much the same way as Louisiana's first use tax on natural gas pipelines crossing the state did, a regulation that was struck down as unconstitutional by the United States Supreme Court in *Maryland v. Louisiana*. 451 U.S. 725 (1981).

FPA preemption and constitutional challenges under the Commerce Clause could pose serious threats to the RPS Adjustment and thus to the Cap-and-Trade Rule itself. This is unfortunate, as the objective of the RPS Adjustment is not discriminatory; rather, it is to ensure the proper accounting of the zero-emission components of renewable energy. Fortunately, protecting the RPS Adjustment from these challenges requires only minor changes to the proposed regulatory text.

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[3] It bears mention that the asset-controlling supplier provisions discussed in Section I above also may be subject to legal challenge on these same preemption grounds.

1. *Expand the Definition of "Eligible Renewable Energy Resource" to Include Non-RPS-Eligible Energy Resources.*

The definition of the term "eligible renewable energy resource," as it is used in Section 95852(b)(4), should be expanded to include sources outside of the RPS program. This not only avoids a characterization of the RPS Adjustment as discriminatory in favor of local interests, it wisely expands the pool of resources available to California for meeting its GHG reduction goals. In creating the RPS program, California had various reasons for excluding certain categories of renewable energy sources from its scope. However, those reasons are independent of the sources' carbon intensity. There are numerous valid, high-quality renewable energy sources that are not part of the RPS program but are excellent sources of emissions-free electricity for the state. To make the requisite change, Powerex suggests revising Section 95802(88) of the Cap-and-Trade Rule to include ARB's previously proposed definition of "variable renewable resource":

> "Eligible Renewable Energy Resource" has the same meaning as defined in Section 399.12 of the Public Utilities Code, <u>as well as run-of-river hydroelectric, solar, or wind energy that requires firming and shaping to meet load requirements.</u>

The change would have the effect of expanding the definition — and, thus, the scope of the RPS Adjustment — to include numerous small hydroelectric facilities throughout the Western Interconnection that are not currently eligible renewable energy resources. At the same time, it avoids any circumvention of ARB's limitation on resource shuffling because the MRR already requires that renewable energy facilities be new, be repowered, or have a historic relationship with California. *See* MRR § 95111(g)(4).

2. *Expand the RPS Adjustment to Allow the Retirement of RECs Outside of the RPS Program.*

To extend the RPS Adjustment to non-RPS sources, Section 95852(b)(4) must be revised to allow entities that do not have RPS obligations to retire RECs. This can be achieved by creating an option to use an ARB REC retirement account as follows:

> RPS adjustment. Electricity imported or procured by an electricity importer from an eligible renewable energy resource reported pursuant to MRR must meet the following conditions to be included in the calculation of the RPS adjustment:
>
> (A) The electricity importer must have either:
>
> 1. Ownership or contract rights to procure the electricity generated by the eligible renewable energy resource; or

> 2. Have a contract to import electricity on behalf of a California entity that has ownership or contract rights to the electricity generated by the eligible renewable energy resource, as verified under MRR.
>
> (B) The RECs associated with the electricity claimed for the RPS adjustment must be either retired into a dedicated California Air Resources Board retirement account operated by the Western Renewable Energy Generation Information System or used to comply with California RPS requirements during the same year in which the RPS adjustment is claimed.

Under the "retirement account" option proposed here, market participants would set up ARB-specific retirement accounts in the Western Renewable Energy Generation Information System ("WREGIS") that are associated with imported power. They would have to show evidence of delivery into the state in the same manner as required under the RPS program, and then retire the associated REC into a WREGIS "California ARB Retirement Account." This is exactly the same process that would be used by entities with RPS obligations, but instead of using the RECs to satisfy the RPS, the RECs would be retired into the WREGIS ARB Retirement account.

WREGIS is a robust platform that has a sufficient level of integrity to allow ARB to be certain that a renewable was shaped and delivered into the state and that the REC associated with the RPS adjustment was actually retired[4]. Setting up a WREGIS ARB retirement account would be a simple process that is already enabled in the current WREGIS configuration that could be accomplished simply by means of an ARB policy direction to users of WREGIS (*i.e.*, electricity deliverers and their verifiers.) The RECs would be verified by through the ARB annual reporting and verification process in exactly the same way as if the REC had been retired for RPS purposes. This and the modification to the definition of "eligible renewable energy resource" are discrete and workable fixes.

III. The Qualified Export Adjustment Requires Adjustment.

Section 95852(b)(5)(A) of the Cap-and-Trade Rule allows for an adjustment to a PSE's emissions obligation for times when that PSE imports and exports electricity in the same hour (a

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[4] A WREGIS retirement account is special account that is defined in the WREGIS Operating Rules as follows: "A Retirement Subaccount is used as a repository for WREGIS Certificates that the Account Holder wants to designate as Retired and remove from circulation (e.g. to demonstrate compliance with a state's RPS). Once a Certificate has been transferred into a WREGIS Retirement Subaccount, it cannot be transferred again." WREGIS Operating Rules (December 2010) at Section 2 (p.5); *see also* Section 6.2 ("Retirement Subaccount") (the rules are available at http://www.wregis.org/uploads/files/854/WREGIS%20Operating%20Rules%20v%2012%209%2010.pdf).

"Qualified Export Adjustment" or "QE Adjustment"). Powerex supports ARB's proposal to include a QE Adjustment in the Cap and Trade Rule. Indeed, without a QE Adjustment, the Cap-and-Trade Rule could have a significant distorting effects on the California energy market. Specifically, if the Cap-and-Trade Rule does not include an appropriate method of adjusting a PSE's emissions obligations whenever that PSE has both imports and exports during the same hour, the PSE will be incented towards a wheel through transaction in which power moves through the state rather than incurring carbon liability for electricity that was not ultimately consumed in California. A QE Adjustment potentially solves the problem by removing any incentive for the importer to select a wheel through over a set of import/export transactions for the same hour.

Unfortunately, as currently proposed, the QE Adjustment still has substantial potential to distort the underlying power markets by inflating the emission obligation of the deliverer and incenting increased use of wheel through transactions in situations where energy is being both imported and exported in the same hour. ARB proposes to calculate the adjustment by multiplying the lower of either the volume of exports or the volume of imports for the hour (MWh) by the lowest emission factor of any portion of those imports or exports. *See* Section 95852(b)(5)(A)(1), (2).

Powerex agrees that the volume of qualified exports should be based on the lower of the quantity of exports and imports for that hour. That is consistent with how a PSE would set up wheel through transactions to accomplish the same purpose. But it is not appropriate to require a PSE to use the lowest emission factor associated with any of the imports/exports in that hour. Restricting PSEs to using only the lowest emission factor may incent wheel throughs of unspecified power and leave lower emission imports to be imported for consumption inside the state. As currently written, PSEs will, on the margin commit to wheel through transactions, since these would be based on an intensity ranking, from highest to lowest, of the imports for that hour and applied to the volume proportionately.

To eliminate any incentive for PSEs to use wheel through transactions to adjust for qualified exports, Powerex suggests the following changes to Section 95852(b)(5)(A)(2):

> The weighted average ~~lowest~~ emission factor of ~~any portion of~~ the ~~qualified exports or~~ corresponding imports for the hour. If the quantity of qualified exports is less than the quantity of corresponding imports for the hour, then the weighted average is calculated by ranking the imports in intensity from highest to lowest and applied to the volume from subsection (1) accordingly.

The suggested changes make the QE Adjustment's calculation method more akin to the calculations that underlie a typical wheel through transaction. Moreover, they also appropriately focus the calculation on the carbon intensity of the electricity being imported but not used in

California. Finally, the changes eliminate the confusion that could arise under the current proposal when, as is often the case, a PSE procures export energy through the CAISO and the carbon intensity is unknown.

IV. The Resource Shuffling Provisions Require Additional Clarification.

A. Further Work is Needed to Refine the Cap-and-Trade Rule's Definition of "Resource Shuffling."

Powerex appreciates that ARB has revised the definition of "resource shuffling" in response to the concerns raised by Powerex and other stakeholders in the comments on ARB's first set of proposed 15-Day Modifications to the two rules that provisions in the definition could have subjected electricity importers to civil and even criminal penalties for circumstances entirely outside of their control. However, the newly proposed definition is sufficiently vague that the regulated community does not have certainty as to what ARB would consider legitimate specified or non-specified imports of electricity and what would be considered illegal "resource shuffling." Accordingly, Powerex urges ARB to clarify the scope of the resource shuffling provisions of the Cap-and-Trade Rule in a formal stakeholder process next year. Powerex also requests that next year ARB develop guidance documents (with example scenarios) that importers and verifiers can use to determine whether imports can or must be claimed as specified under the Cap-and-Trade Rule.

In anticipation of the additional work on the provision, Powerex recommends that ARB modify the definition of "resource shuffling" in Section 95802(251) as follows:

> "Resource Shuffling" means any plan, scheme, or artifice to receive credit based on emissions reductions that have not occurred, involving the delivery of electricity to the California grid, in accordance with any additional guidance developed by the California Air Resources Board.

B. The Relationship Between Section 95111(g)(4) of the MRR and the Cap-and-Trade Rule's Definition of Resource Shuffling Remains Unclear.

In its August 11, 2011 comments, Powerex asked ARB to explain the relationship between resource shuffling, as that term is defined in the Cap-and-Trade Rule, and the "specified source" requirements of Section 95111(g)(4) of the MRR. Section 95111(g)(4) appears to list characteristics whereby if at least one of them is applicable to an electricity delivery from a specified source, that delivery will not be considered to be resource shuffling. ARB did not respond to Powerex's request for clarification. If, indeed, the characteristics listed in Section 95111(g)(4) of the MRR are intended to function as categories of "safe harbor" under the resource shuffling provisions, then Powerex urges ARB to make the following changes.

First, in order to satisfy the United States' obligations under NAFTA, the special treatment afforded to the federally-owned power suppliers under Section 95111(g)(4)(B) must be extended to provincially-owned entities such as Powerex, which is wholly owned and controlled by BC Hydro, a foreign sovereign. As noted above in Section I above, NAFTA's National Treatment standard requires that Powerex and BPA be accorded parity treatment. To be consistent with NAFTA, Section 95111(g)(4)(B) should be revised as follows:

> Deliveries from existing federally or provincially owned hydroelectricity facilities by exclusive marketers. Electricity from specified federally or provincially owned hydroelectricity facility delivered by exclusive marketers.

Second, Powerex urges ARB to eliminate Section 95111(g)(4)(C) of the MRR because the phrase "deliveries from existing federally owned hydroelectricity facilities allowed under contract" appears to excuse from the definition of resource shuffling the precise type of activity that the Cap-and-Trade Rule seeks to discourage. The clause seems to presume that deliveries by the exclusive marketers of federally owned hydroelectricity facilities are limited to surplus electricity and, thus, would never constitute resource shuffling. But this is a false assumption. In fact, there is no way to ensure that entities with such contracts would limit their deliveries of this electricity to California to its surplus rather than maximizing the delivery of this federal power to California and back filling its load requirements with market power. Rather, as currently drafted, this provision would give these entities an incentive to engage in such activity to maximize the value of the emissions-free power from the federal facilities. Surely such activity would qualify as a "scheme or artifice to receive credit based on emission reductions that have not occurred" — *i.e.*, resource shuffling. Accordingly, Section 95111(g)(4)(C) should be deleted.

V. ARB Should Commit to Work with Stakeholders in Advance of the Cap-and-Trade Program's Full Implementation in 2013.

With AB 32's mandatory emission reduction goal looming, Powerex understands ARB's urgency in finalizing the Cap-and-Trade Rule and making the corresponding changes to the MRR. Indeed, Powerex applauds ARB's commitment to the goal and its extensive public outreach efforts to gain stakeholder input at all stages of the rulemakings. Despite this effort, however, gaps and inconsistencies between the Cap-and-Trade program and the MRR remain and could threaten the long-term success of the programs. These include the major infirmities discussed above, as well as others that simply may not have been identified during the current, highly expedited rulemaking process.[5]

[5] We note that stakeholders have had very limited opportunities to comment on the two sets of proposed 15-day rule modifications, which have proposed significant changes to the Cap-and-Trade Rule that was adopted December 16,

Therefore, even if all of the changes proposed above are made prior to the finalization of the Cap-and-Trade Rule and the MRR in October, Powerex encourages ARB to include in its resolutions adopting the rules a directive to ARB staff to continue vetting these important issues through a regulatory refinement process that includes stakeholder workshops. Such a directive, which could be modeled upon Resolution 10-42, should direct the ARB Executive Officer to prepare additional 15-day rule modifications which then would form the basis of amendments to the rules that then could be adopted by the Board in 2012 prior to the Cap-and-Trade Rule's full implementation in 2013. Powerex also requests that ARB utilize the 2012 period to develop detailed guidance documents to clarify many of the issues in the rules that remain ambiguous. These additional steps would not interfere with adoption of the modified rules in October, but would ensure that the ARB staff has full authority to continue its work on refining the program prior to its full implementation in 2013.

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Thank you for your review and consideration of these comments. Again, Powerex applauds ARB for its continued work to implement the mandate of AB 32 and, in particular, its work on market-based compliance mechanisms. If you have any questions on the enclosed comments, please contact me, at 415-262-4008 or nvanaelstyn@bdlaw.com, or my colleague, Amy Lincoln, at 415-262-4029 and alincoln@bdlaw.com.

Sincerely,

Nicholas W. van Aelstyn

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2010. It may be that some of these proposed modifications exceed the scope of ARB Resolution 10-42 and California Government Code Section 11346.8(c).